82-1680

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

JESSIE ANTHONY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

WHETHER A NON-CONSENSUAL ENTRY OF A SUSPECT'S DWELLING AND A SEARCH INCIDENT THERETO ARE CONSTITUTIONALLY VALID BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES BASED UPON THE HOLDING OF *WARDEN v HAYDEN*, 387 US 294, 87 S Ct 1642, 18 LEd 2d 782 (1967), AND ARE NOT CONSTITUTIONALLY INVALID, AS HELD BY THE MICHIGAN COURT OF APPEALS, BASED UPON THE HOLDING OF *PAYTON v NEW YORK*, 445 US 573, 100 S Ct 1379, 63 LEd 2d 639 (1980) WHERE THE ENTRY WAS MADE WITHIN TWENTY (20) MINUTES OF THE ROBBERY IN THE INSTANT CASE AND WHERE PRIOR TO THE ENTRY OF THE DWELLING THE POLICE HAD BEEN PERSONALLY INFORMED BY THE VICTIM OF THE OCCURRENCE OF THE ROBBERY AND HAD LIKEWISE BEEN INFORMED OF WHERE ONE OF THE ROBBERS LIVED BY A CIVILIAN WHO KNEW THE ROBBER AND WHERE IN FACT THE POLICE WERE TAKEN TO THAT DWELLING BY THE CIVILIAN?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan by WILLIAM L. CAHALAN, Prosecuting Attorney for the County of Wayne; EDWARD REILLY WILSON, Deputy Chief, Civil and Appeals; and FRANK J. BERNACKI, Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on October 6, 1982, rehearing denied by the Court of Appeals on December 2, 1982, and leave to appeal denied by the Michigan Supreme Court on February 22, 1983.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 120 Mich App 207, ____NW2d____ (1982) and is appended as Appendix A. The Michigan Court of Appeals order denying rehearing is appended as Appendix B. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued October 6, 1982, and rehearing was denied on December 2, 1982. The Michigan Supreme Court denied leave to appeal on February 28, 1983. The jurisdiction of this court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On October 30, 1979, Seymour Greer, the proprietor of Seymour Greer Company, a clothing business, located at 15738 Livernois in the City of Detroit, Michigan, was in his place of business (R-I, 20-21). At about 3:00 p.m., a black male entered Greer's office and announced a "stick-up" (R-I, 22-23). The black male then ordered Greer to lie on the floor and ordered him, "keep your head down or I'll blow your head off." Greer's employee Kathleen Whitlow was then brought into the office and was likewise forced to lie on the floor (R-I, 24-26).

Subsequently, two other men including respondent, Jessie Anthony, along with the first robber proceeded to take $700, two diamond rings and a watch from Greer's person and an additional $900 from the office (R-I, 26-27). In addition, 15 men's suits were taken by the robbers. Greer then showed the three robbers how to get out of the building (R-I, 28-31). After the robbers left, the police arrived at the store in five (5) or six (6) minutes. Another man came into the store and stayed a short time of seven (7) to eleven (11) minutes (R-I, 32-33).

Sylvester Fields, who lived at 1633 Pilgrim, about a two (2) minutes walk from the Seymour Greer Company, was working in his garage at about 3:00 p.m. on October 30, 1979 (R-I, 62). At that time he saw three men carrying men's suits running through the alley, one of these men he identified as respondent Jessie Anthony, who was a person Fields had known for five (5) years (R-I, 63-64). After the men passed him, Fields walked up the alley and across the street to Seymour Greer's Clothing Store (R-I, 64-65). When he got to the store, he talked with the police officers who were there and informed them that he knew where Jessie Anthony lived. He then rode with the police to a house on Santa Rosa Street and left (R-I, 65-66).

Detroit police officers, after speaking with Greer and being informed of the fact that Greer's clothing store had been robbed, talked with a civilian and were taken to 15876 Santa Rosa (R-I, 88-90).

The Detroit police officers then approached the house Fields had shown them at 15876 Santa Rosa Street, knocked on the door, announced their presence, heard running and talking from within the house and then finally entered the dwelling (R-II, 4-5). Anthony, along with two other men, Donald Kline and Robert Owen, were apprehended. $328 in cash, 14 men's suits and roll of dimes and two rolls of nickels

were taken from Kline (R-II, 93-94); $500 in cash was taken from Owens (R-II, 22); and $384 and a woman's diamond ring, which Greer identified, were taken from respondent Anthony (R-II, 80).

Jessie Anthony testified he lived at the 15876 Santa Rosa address (R-II, 56).

The Michigan Court of Appeals reversed respondent's armed robbery conviction holding that the police were required to get a warrant pursuant to the holding of *Payton v New York*, 445 US 573, 100 SCt 1371, 63 LEd 2d 639 (1980). The Court of Appeals likewise held that *Warden v Hayden*, 387 US 294, 87 SCt 1642, 18 LEd 2d 782 (1967) was factually distinguishable from the instant case, and therefore the warrantless search in the instant was not exempted from the warrant requirements of the Fourth Amendment as being the result of "exigent circumstances." Rehearing was denied on December 2, 1982. The Michigan Supreme Court denied leave to appeal on February 28, 1983.

REASONS FOR GRANTING THE WRIT

In *New York v Payton*, 445 US 573, 100 SCt 1371, 63 LEd 2d 639 (1980), this Court held a New York statute to be unconstitutional which authorized a warrantless entrance of a person's home to effectuate a felony arrest where the police had probable cause to believe the suspect had committed a crime and was in his dwelling. However, the *Payton* holding specifically exempted from the scope of its decision the question of whether "exigent circumstances" would excuse the police from obtaining an arrest warrant prior to their forcible entry of a dwelling. Id. at 583.

In fact, this Court in *Warden v Hayden*, 387 US 294, 87 SCt 1642, 18 LEd 2d (1967), upheld the constitutionality of a warrantless entry into a suspect's home to effectuate his arrest where exigent circumstances existed.

Specifically, in *Warden v Hayden*, several items of clothing which linked defendant to the robbery were seized by the police during a *search of defendant's home*. Id., at 296. In fact, defendant had robbed the Diamond Cab Company and two cab drivers followed defendant to 2111 Cocoa Lane. This information was relayed to the cab company dispatcher who in turn relayed the same to the police.

With only this information, which was obtained via the telephone or radio, the police proceeded to that address, found defendant on second floor and the evidence in question in the basement.

This Court stated the following in holding the warrantless search was constitutionally valid:

> The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation to do so would gravely endanger their lives or the lives of others. Speed here were essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape. Id., at 298-299.

On October 30, 1979, Seymour Greer, the proprietor of Seymour Greer Company, a clothing business, located at 15738 Livernois in the City of Detroit, Michigan, was in his place of business (R-I, 20-21). At about 3:00 p.m., a black male entered Greer's office and announced a "stick-up" (R-I, 22-23). The black male then ordered Greer to lie on the floor and ordered him, "keep your head down or I'll blow your head off." Greer's employee Kathleen Whitlow was then brought into the office and was likewise forced to lie on the floor (R-I, 24-26).

Subsequently, two other men including respondent, Jessie Anthony, along with the first robber proceeded to take $700, two diamond rings and a watch from Greer's person and an additional $900 from the office (CR-I 26-27). In addition, 15 men's suits were taken by the robbers. Greer then showed the three robbers how to get out of the building (R-I, 28-31). After the robbers left, the police arrived at the store in five (5) or six (6) minutes. Another man came into the store and stayed a short time of seven (7) to eleven (11) minutes (R-I, 32-33).

Sylvester Fields, who lived at 1633 Pilgrim about a two (2) minutes walk from Seymour Greer Company, was working in his garage at about 3:00 p.m. on October 30, 1979 (R-I, 62). At that time he saw three men running through the alley carrying men's suits, one of these men he identified as respondent Jessie Anthony, who was a person Fields had known for five (5) years (R-I, 63-64). After the men passed him, Fields walked up the alley and across the street to Seymour Greer's Clothing Store (R-I, 64-65). When he got to the store, he talked with the police officers who were there and informed them that he knew where Jessie Anthony lived. He then rode with the police to a house on Santa Rosa Street and left (R-I, 65-66).

Detroit police officers, after speaking with Greer and being informed of the fact that Greer's clothing store had been robbed, talked with a civilian and were taken to 15876 Santa Rosa (R-I, 88-90).

The Detroit police officers then approached the house Fields had shown them at 15876 Santa Rosa Street, knocked on the door, announced their presence, heard running and talking from within the house and then finally entered the dwelling (R-II, 4-5). Anthony, along with two other men, Donald Kline and Robert Owen, were apprehended. $328 in cash, 14 men's suits and roll of dimes and two rolls of nickels were taken from Kline (R-II, 93-94); $500 in cash was taken from Owens (R-II, 22); and $384 and a woman's diamond ring, which Greer identified, were taken from respondent Anthony (R-II, 80).

Jessie Anthony testified he lived at the 15876 Santa Rosa address (R-II, 56).

Therefore, within a few minutes of the robbery, police officers had responded and spoken personally with the victim of the crime and an independent witness who had seen the defendant and the other two men running from the complainant's store. The witness further testified he had known defendant for five years and knew defendant lived in the area on Santa Rosa Street. This evidence is even more compelling then that in *Warden v Hayden* since the police were able to verify their information personally with the victim as well as with an independent witness. Further, speed was as essential in the instant case as in *Warden v Hayden*, to avoid escape or destruction of any relevant evidence. Therefore, the subsequent search was justified by the exigent circumstances just as the search in *Warden v Hayden* was justified.

The Michigan Court of Appeals, however, in rendering its opinion stated the following:

> The prosecutor cites *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967), as authority for upholding the search in this case. That case, we believe, differs radically from the one at bar. The distinction is that a reliable third party saw the

> suspect enter the house. The officers' actions, therefore, were not directed to a house where the suspect was living but where he had entered moments before. *People v Jessie Anthony*, ____ Mich App ____ (Docket No. 52874, 106-82 at 4).

The Michigan Court of Appeals was therefore factually incorrect in that, contrary to the Court of Appeals opinion, in *Warden v Hayden*, the area searched was in fact defendant's home and in the instant case the police obtained even more reliable and verifiable information than in *Warden v Hayden* from an independent witness and did not have to rely upon a mere hearsay transmission of a report of a criminal offense.

In so doing the Michigan Court of Appeals ignored the exigency of the circumstances involved in the instant case and implicitly held that a felon has a right tantamount to the medieval right of sanctuary if he escapes to his house before being apprehended.

The Michigan Court of Appeals, as noted above, further grounded its decision on the holding of *Payton v New York*; however, the holding of the court in the instant case, as well as in several other cases noted within the court's opinion, have applied the holding of *Payton v New York* so that all searches pursuant to a warrantless arrest in a suspect's home are constitutionally violative of the Fourth Amendment. Petitioner would maintain that such a holding is incorrect and that, as in the instant case, the exigency of pursuing a suspect from the scene of a crime excuses the police from diverting their pursuit to first obtain a warrant.

CONCLUSION

It is respectfully submitted for the reasons outlined above that plenary review should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v 52874

JESSIE ANTHONY,
Defendant-Appellant.

Before: D.C. Riley, P.J., R.B. Burns and S. Everett, JJ.

PER CURIAM

Defendant was charged with the armed robbery, MCL 750.529; MSA 28.797, of a clothing store. A jury found him guilty as charged and he was ultimately sentenced to a term of from 15 to 30 years in prison.

While the police were investigating at the scene of the crime, they were told by one Sylvester Fields that he knew where the people who had robbed the store lived. Fields had seen three men, allegedly including defendant, running through the alley carrying clothing shortly after the robbery had occurred. The police were led by Fields to the defendant's home. The police had no information that anyone had recently entered the house. Three patrolmen and one sergeant were at the house when the decision to announce their presence was made. When the police knocked on the door and identified themselves, they heard some running and men talking inside. The officers, receiving no response, forced open the door. Somewhere between 15 to 30 minutes had elapsed from the time of the robbery until the police forcibly entered defendant's house. Defendant was found hiding in the basement under a

pile of clothes. Donald Kline and Robert Owens were also found hiding in the house along with stolen items from the clothing store. Defendant had $284 in cash and a woman's diamond rings, which had been stolen from a salesperson in the store, on his person. Robert Owens had $322 and an Omega watch on his person.

Kline pled guilty to the charge of armed robbery and testified that defendant was not involved in the crime. *People v Kline*, ____ Mich App ____; NW2d (Docket #51310. released 3/2/82). Defendant testified that he was home in his basement repairing a broken water pipe at the time of the robbery.

Defendant raises a number of issues, one of which requires reversal. Defendant argues that the police lacked probable cause to conduct a warrantless search and seizure of defendant's residence and, therefore, the resulting evidence should have been suppressed.

The lower court's decision denying the motion to suppress, according to the briefs filed in this appeal, was grounded on the position that the police were in "hot pursuit" and, therefore were justified in entering the house. Once the officers were in the house, the evidence seized apparently was in "plain view". Both of these terms relate to exceptions to the warrant requirement of the US Const, Am IV, Mich Const 1963, art I, §11. All too often, terms such as these are used in an arcane manner without solid legal analysis.

A warrantless search is unreasonable per se unless there exists both probable cause and circumstances establishing one of the delineated exceptions to the warrant requirement. *People v Mullaney*, 104 Mich App 787, 792; 306 NW2d 347 (1981). Probable cause has been defined as a state of mind which stems from some fact, circumstance or information which

would create an honest belief in the mind of a reasonably prudent person. *People v Gwinn*, 47 Mich App 134, 140; 209 NW2d 297 (1973). Exigent circumstances are present where immediate action is necessary to (1) protect the police officers or other persons, (2) prevent the loss or destruction of evidence or (3) to prevent the escape of the suspect. *People v Dugan*, 102 Mich App 497, 503; 302 NW2d 209 (1980).

In *Payton v New York*, 445 US 573; 100 S Ct 1379; 63 L Ed 2d 639 (1980), the Court held that absent exigent circumstances, a warrantless, nonconsensual entry into a house to make a routine felony arrest is prohibited. *People v Woodward*, 111 Mich App 528; __ NW2d __ (1981). In *Woodward*, a panel of this Court found the forcible entry into the home and the subsequent arrests of the defendants therein to be illegal due to the lack of exigent circumstances. The police were led to the Woodward house by one of the apprehended participants in the underlying robbery shortly after the crime. After announcing themselves as police, the team of officers heard running inside the house which prompted the police to force open the door. On the basis of *Payton*, the warrantless arrests were found to be illegal due to the lack of exigent circumstances.

In *People v Van Auker*, 111 Mich App 478; __ NW2d __ (1981). The people argued that a warrantless, nonconsensual entry was necessary to prevent defendant's escape and prevent destruction of evidence. The Court stated:

> "There was testimony that at least five police officers were present at the time of defendant's arrest and that there was only one entrance to the apartment in which he was hiding. Under these circumstances, we believe that the officers could have

> kept watch over the the building and prevented any attempted escape while waiting for an arrest warrant to be issued."

The *Woodward* and *Van Auker* decisions demonstrate that the term exigent does not mean expedient. The officers in *Woodward* knew nothing more than that defendant lived in the house, not that he was in the house. The running they heard did not create exigent circumstances. The officers in *Van Auker* had the apartment completely under their control and the defendant could not escape and they were in no danger. Therefore, they were required to obtain a warrant rather than forcibly enter the dwelling which was more expedient.

In the case at bar, the three officers had the house under control. They were in no danger and there was no testimony that the police believed defendant could escape or would destroy valuable evidence. Exigent circumstances were lacking in this case.

The prosecutor cites *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L EWd 2d 782 (1967), as authority for upholding the search in this case. That case, we believe, differs radically from the one at bar. The distinction is that a reliable third party saw the suspect enter the house. The officers' actions, therefore, were not directed to a house where the suspect was living but where he had entered moments before. Compare, *People v Stergowski* 391 Mich 714; 219 NW2d 68 (1974), and *People v Strelow*, 96 Mich App 182; 292 NW2d 517 (1980), with *People v Lynn*, 91 Mich App 117; 282 NW2d 664 (1979), *aff'd* 411 Mich 291 (1981).

We conclude, therefore, that the officers lacked exigent circumstances to enter the house. The trial court erred in failing to suppress the evidence. *People v Donald Kline, supra.*

Reversed.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v 52874

JESSIE ANTHONY,
Defendant-Appellant.

Before: D.C. Riley, P.J., R.B. Burns and S. Everett, JJ,
S. EVERETT, Dissenting

In *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981), the Supreme Court stated that neither the trial court nor the Court of Appeals could properly rule on a motion to suppress evidence without a full evidentiary hearing. At page 389, the Court said:

> For the Court of Appeals to presume to rule on the merits in such an absence of proper procedure requires this Court to point out to that Court and all trial courts that a motion to suppress evidence requires the holding of a full evidentiary hearing and any attempt to rule on such a motion on the basis of a preliminary examination transcript alone is inadequate and erroneous."

In this case, no such hearing was held. In view of the mandate of the Supreme Court, it appears to me that this matter should be remanded for the required hearing. I therefore must respectfully dissent.

APPENDIX B

ORDER DENYING MOTION FOR REHEARING
(State of Michigan — Court of Appeals)

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the city of Detroit, on the twenty-fourth day of November in the year of our Lord one thousand nine hundred and eighty-two.

Present: The Honorable Dorothy Comstock Riley, Presiding Judge, Robert B. Burns, Stanley Everett, Judges.

In this cause a motion is filed by plaintiff-appellee for rehearing of this Court's opinion released October 6, 1982, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court.

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

Judge Everett votes to grant the rehearing in this matter limited, however, to the question of whether the case should be remanded to the trial court for a full evidentiary hearing on the issue of whether the evidence should be suppressed.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 2nd day of December in the year of our Lord one thousand nine hundred and eighty-two.

/s/ Ronald L. Dzierbicki
Clerk

APPENDIX C

ORDER FOR APPLICATION FOR LEAVE TO APPEAL
(State of Michigan — Supreme Court)

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of February in the year of our Lord one thousand nine hundred and eighty-three.

Present: The Honorable G. Mennen Williams, Chief Justice, Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court is said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of February in the year of our Lord one thousand nine hundred and eighty three.

/s/ Corbin R. Davis,
Deputy Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

STATE OF MICHIGAN,

Petitioner,

vs.

JESSIE ANTHONY,

Respondent.

_____/

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS AT LAW
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JESSIE ANTHONY,

Respondent.

_____/

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Jessie Anthony respectfully requests this Honorable Court to deny the petition for writ of certiorari.

OPINIONS BELOW

Review is sought for the opinion of October 6, 1982, by the Michigan Court of Appeals (Petition Appendix A, pp. 1a-5a). The opinion is reported as People v. Jessie Anthony, 120 Mich Ap 207; _____ NW2d _____ (1982). The Michigan Court of Appeals order denying rehearing is attached to the Petition as Appendix B. The order of The Michigan Supreme Court denying leave to appeal is attached to the Petition as Appendix C.

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COUNTERSTATEMENT OF QUESTION PRESENTED

WHETHER THE MICHIGAN COURT OF APPEALS PROPERLY APPLIED STATE CONSTITUTIONAL PRINCIPLES BY SUPPRESSING EVIDENCE SEIZED DURING A NON-CONSENSUAL WARRANTLESS SEARCH OF A SUSPECT'S DWELLING SOME 15 TO 30 MINUTES AFTER THE ROBBERY WHERE THE HOUSE WAS UNDER THE CONTROL OF FOUR POLICE OFFICERS, THE OFFICERS WERE IN NO DANGER, NO ONE SAW THE SUSPECTS ENTER THE HOUSE, AND THERE WAS NO TESTIMONY THAT VALUABLE EVIDENCE WAS IN DANGER OF BEING DESTROYED?

THE STATUTES INVOLVED

Article I, Section 11 of the Michigan Constitution provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

COUNTERSTATEMENT OF THE FACTS

On October 30, 1979, around 3:00 p.m., a robbery took place at a clothing store located at 15738 Livernois, Detroit, Michigan. According to the complainant, Seymour Greer, a black male entered his office with a pair of pants over his arm and announced a "stick-up" (R-I, 22). This man and another black male stole jewelry, cash and fifteen men's suits then ran across the street with a third man (R-I, 28-30; 60).

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The police arrived at the scene within five or six minutes of the robbery (R-I, 32). The officers spoke with Mr. Greer and his employee, Mrs. Whitlow, for approximately five to ten minutes (R-I, 89). A civilian, Sylvester Fields, walked up to the police and told them he knew where the people lived "that went in the store" (R-I, 65). Mr. Fields testified that he had observed three men carrying new clothing and running through the alley around 2:00 or 2:30 in the afternoon (R-I, 69). After awhile he went across the street and talked to the officers (R-I, 65). He led them to the respondent's home (R-I, 88-90).

At the house, three Detroit officers set up surveillance and called for a supervisor (R-I, 90, 91). Sergeant Howell arrived at the scene and discussed the situation with Officer Chesney (R-II, 5). Sergeant Howell went to the front door and knocked several times, heard some running and men talking, announced that they were police officers and then forced open the door (R-II, 5).

Respondent and two other men were found hiding in the house. $384.00 and a woman's diamond ring were confiscated from respondent (R-II, 18). Fourteen men's suits were confiscated in an upstairs bedroom (R-I, 94). Cash and jewelry were found on the other two men (R-I, 93, R-II, 22).

Respondent testified that he lived at the address searched (R-II, 56).

The Michigan Court of Appeals reversed respondent's conviction for armed robbery holding that the trial court erred in failing to suppress the evidence seized in the house without a warrant. As authority for their holding, the court cites both

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Federal and State constitutional provisions relating to search and seizure. Similarly, in the course of their analysis, both state and federal decisions are utilized. The court found no exigent circumstances to justify dispensing with the warrant requirement. Rehearing was denied by the Michigan Court of Appeals on December 2, 1982. The Michigan Supreme Court denied leave to appeal on February 28, 1983.

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SUITE 1979
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REASONS FOR DENYING THE WRIT

I. THE MICHIGAN COURT OF APPEALS DECISION IS FOUNDED ON STATE CONSTITUTIONAL LAW, NOT FEDERAL

In Orr v. Orr, 440 US 268; 99 S Ct 1102; 59 L.Ed 2d 306 (1979) this Court held that state court judgments anchored on an independent and adequate state ground will not be reviewed. If embiguity exists as to whether the state court decision was based on federal or state grounds, this Court may remand the matter to the state court to make a determination of whether their decision is grounded on state or federal constitutional grounds, or both State of California v. Judith Krivda, 409 US33; 34 LEd 2d 45, 93 S Ct 32, reh den 409 US 1068, 34 LEd 2d 520, 93 S Ct 549 (1972).

The Michigan Court of Appeals decision in the instant case is sufficiently supported by established Michigan Constitutional provisions and local case precedent to provide an independent and adequate nonfederal basis for it. The decision below relies on Article I, Section 11 of the Michigan Constitution of 1963, which is similar but not identical to the Fourth Amendment to the United States Constitution. The two-fold test applied by that court requiring a showing of both probable cause and exigent circumstances is supported by numerous local decisions, People v. Mullaney, 104 Mich App 787, 792; 306 NW2d 347 (1981); People v. Gwinn, 47 Mich App 134; 209 NW2d 297 (1973) and People v. Dugon, 102 Mich App 497; 302 NW2d 209 (1980).

Payton v. New York, 445 US 573; 100 S Ct 1379; 63 L Ed 2d

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639 (1980) while supportive of the Michigan court's decision, is by no means necessary to it. The decision in Payton, id., merely reconfirms the existing state of search and seizure law under the Michigan Constitution.

Similarly, in discussing Warden v. Hayden, 387 US 294; 87 S Ct 1642; 18 LEd 2d 782 (1967), the Michigan Court of Appeals in no way indicates it is relying on federal constitutional law in reaching its decision. That court cites two Michigan decisions supporting their finding of no exigent circumstances (People v. VanAuker, 111 Mich App 478; ____ NW2d ____ (1981), People v. Woodard , 111 Mich App 528, ____ NW2d ____ (1981).

Since the decision being attacked stems from a state court and is adequately supported by state constitutional provisions, the decision of the Michigan Court of Appeals should not be reviewed by this Honorable Court.

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II. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE INSTANT CASE

A. THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT THERE EXISTED NO EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS ENTRY AND SEARCH OF RESPONDENT'S DWELLING FIFTEEN TO THIRTY MINUTES AFTER A ROBBERY WHERE THE HOUSE WAS UNDER THE CONTROL OF FOUR POLICE OFFICERS, THE OFFICERS WERE IN NO DANGER, NO ONE SAW THE SUSPECTS ENTER THE HOUSE, AND THERE WAS NO TESTIMONY THAT VALUABLE EVIDENCE WAS IN DANGER OF BEING DESTROYED.

Assuming that the Michigan Court of Appeals based their decision on the United States rather than the Michigan Constitution, that court correctly applied the Fourth Amendment of the United States Constitution and the decisional law of this Honorable Court to the facts of this case. There is no difficulty posed by this case which requires review by this Court. The Michigan Court of Appeals decision does not demonstrate any flawed interpretation or misunderstanding of the federal or state rules governing the exigent circumstances exception to the warrantless search of a suspect's home.

In its opinion, the Michigan Court of Appeals correctly started from the premise that a warrantless search is unreasonable absent a showing by the people that the police acted based on probable cause and in response to an exigent circumstance establishing a delineated exception to the warrant requirement, Coolidge v. New Hampshire, 403 US 443; 91 S Ct 2022; 29 LEd 2d 564 (1971). Those circumstances were correctly

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identified as: (1) for the protection of police officers or others; (2) to prevent the loss or destruction of evidence, or; (3) to prevent the escape of the suspects. People v. Dugan, 102 Mich App 497; 302 NW2d 209 (1980).

Applying the above principles to the instant case, the court noted that the police officers were merely told by a Sylvester Fields that he knew where the people involved in the robbery lived, not that the suspects and evidence were actually present at the house searched. This fact clearly distinguishes the instant case from Warden v. Hayden, supra. Whereas in Warden, the officers were told that the suspect had entered the house moments earlier; the record in the instant case reveals that the officers had no way of knowing that the suspects had in fact returned to their dwelling or having returned there, were still there fifteen to thirty minutes after the robbery.

In dealing with the various "exigent circumstances" identified above, the Michigan Court of Appeals goes on to state:

> "In the case at bar, the three officers had the house under control. They were in no danger and there was no testimony that the police believed defendant could escape or would destroy valuable evidence. Exigent circumstances were lacking in this case. People v. Jessie Anthony, 120 Mich App 207 1 ___ NW2d ___ (1982).

The facts clearly support a finding of a lack of exigent circumstances as well as a finding (which was never made) of a lack of probable cause.

Petitioner mistakenly asserts that the Michigan Court of Appeals decision in the instant case as well as in other cases cited in their opinion are tantamount to removing the "exigent

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circumstances" exception to the warrant requirement from search and seizure analysis. In the instant case the Court of Appeals expressly considered the factual bases necessary to justify a warrantless search before concluding that the officers lacked the necessary exigent circumstances to enter the house without a warrant. If, as petitioner suggests, the Court of Appeals has decided that under Payton v. New York, all warrantless searches in a suspect's home are invalid, the analysis reviewed above would hardly be necessary.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JESSIE ANTHONY,

Respondent.

_____/

STATEMENT AS TO MAILING

I, JOHN M. RICKEL, attorney for Respondent, hereby state, pursuant to Rule 28.2, that the following papers pertaining to the above captioned cause were deposited in the United States Government mail receptacle in the Renaissance Center, Detroit, Michigan 48243, within the time for filing said papers, and that the same were properly addressed to the Clerk of the United States Supreme Court and that first class postage was prepared.

The papers so mailed were:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Affidavit
Respondent's Brief in Opposition
Statement of Mailing
Proof of Service

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PAUL C. LOUISELL (P27152)

IN THE

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OCTOBER TERM, 1982

No.

PEOPLE OF THE STATE OF MICHIGAN,

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vs.

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---/

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

PATRICIA L. MOHASKE, being first duly sworn, deposes and says that on May 12, 1983, she mailed one copy of:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Affidavit
Respondent's Brief in Opposition
Statement of Mailing

TO: Wayne County Prosecutor
Frank Murphy Hall of Justice
1441 St. Antoine - Room 1200
Detroit, Michigan 48226

Patricia L. Mohaske
PATRICIA L. MOHASKE

Subscribed and sworn to before
me this 12th day of May, 1983.

Sharon M White

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ATTORNEYS AT LAW
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1680

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JESSIE ANTHONY,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES JESSIE ANTHONY, RESPONDENT in the above captioned cause, by his attorneys, Rickel, Earle & Robb, by Paul C. Louisell, and requests this Honorable Court to grant leave to proceed in forma pauperis pursuant to Rule 46. The Respondent's affidavit in support of this motion is attached hereto.

RICKEL, EARLE & ROBB

BY: _____
JOHN M. RICKEL (P19432)

BY: _____
PAUL C. LOUISELL (P27152)
Rickel, Earle & Robb
100 Renaissance Center
Suite 1575
Detroit, Michigan 48243
(313) 259-3500

Dated: May 12, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JESSIE ANTHONY,

Respondent.

_____/

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

I, JESSIE ANTHONY, being first duly sworn according to law, depose and say in support of my motion for leave to proceed in forma pauperis, without being required to prepay costs of fees:

1. I am the Respondent in the above captioned cause: I am a citizen of the United States of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

(a) I am presently unemployed.

(b) I last worked in 1979 at Blue Light Lawn; my income was approximately $125.00 per week.

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(c) I receive $145.00 per month in general assistance payments plus $75.00 per month in food stamps. I reside at 7740 Chalfonte and pay the landlord $140.00 per month for rent.

(d) I have received no income in the last twelve months from any business, profession or other form of self employment, or in the form of rent payments, dividends, or other sources. I have no savings or checking accounts or accumulated cash. I own no real estate, stocks, bonds or notes.

(e) I was unable to afford retained counsel at any of the lower court proceedings. My present attorney, Paul C. Louisell, was appointed to represent me on appeal by the trial court after I signed an affidavit of indigency dated May 14, 1980.

Further I say not.

Jessie Anthony Jr
JESSIE ANTHONY

Subscribed and sworn to before
me this 2nd day of May, 1983.

Sharon M White

SHARON M. WHITE
Notary Public, Macomb County, MI
My Commission Expires Feb. 4, 1985

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